

Foodland, Inc., d/b/a Super H Discount and United Food and Commercial Workers, Retail Clerks Union Local 73R and United Food and Commercial Workers International Union, Meat Cutters Local No. 644, AFL-CIO-CLC. Cases 16-CA-10042 and 16-CA-10046

May 18, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On January 25, 1982, Administrative Law Judge William N. Cates issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Foodland, Inc., d/b/a Super H Discount, Owasso, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge: This case was heard before me on November 3 and 4, 1981,¹ at Tulsa, Oklahoma. The hearing was held pursuant to an order consolidating cases, consolidated complaint, and notice of hearing issued by the Regional Director for Region 16 of the National Labor Relations Board, hereinafter the Board, on September 24, and is based upon charges which were filed on September 3 by United Food and Commercial Workers, Retail Clerks Union Local 73R, hereinafter Union Local 73R, in Case 16-CA-10042, and on September 4 by United Food and Commercial Workers International Union, Meat Cutters

¹ All dates hereinafter are in 1981 unless otherwise indicated.

Local No. 644, AFL-CIO-CLC, hereinafter Union Local 644, in Case 16-CA-10046. The consolidated complaint alleges that Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, hereinafter the Act, by refusing to bargain collectively with Union Local 73R and Union Local 644 as the exclusive collective-bargaining representatives of employees in appropriate units.

Respondent filed a timely answer to the consolidated complaint. The answer admitted certain matters, but denied the substantive allegations and that Respondent had committed any unfair labor practices.

All parties appeared at the hearing and were afforded full opportunity to be heard, to introduce and to meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. I have carefully considered the contents of the brief filed on behalf of Respondent.

Upon consideration of the entire record, Respondent's brief, and my observation of the demeanor of the witnesses, I make the following:²

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all times material herein, Respondent, an Oklahoma corporation, maintained its principal offices in Tulsa, Oklahoma, where it is engaged in the operation of six retail grocery stores.³ During the year preceding issuance of the order consolidating cases, consolidated complaint, and notice of hearing, Respondent, in the course and conduct of its business operations, had gross annual revenues in excess of \$500,000 and, during the same period of time, it purchased goods valued in excess of \$50,000 directly from suppliers located outside the State of Oklahoma. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The record reflects, and I find, that Union Local 73R and Union Local 644 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Established Facts

Respondent operates six retail grocery stores in northeast Oklahoma and maintains its central corporate office in Tulsa, Oklahoma. The stores are located in Owasso, Skiatook, Coweta, Bristo, and Bartlesville (two stores),

² There are no disputed facts in this record. The brief testimony of the two witnesses called in this proceeding, both of whom were called by counsel for the General Counsel, related to exhibits and their testimony was not disputed. I therefore credit the testimony of the two witnesses called by counsel for the General Counsel. Further, no issue exists as to the authenticity of any exhibit received in evidence in the instant cases.

³ The only facility of Respondent involved herein is its retail store located at 11520 North Garnett Road, Owasso, Oklahoma.

Oklahoma. The only location involved in the instant case is the Owasso, Oklahoma, store.

On March 24, Union Local 73R filed a petition in Case 16-RC-8313 in which it sought to represent the employees of Respondent at its Owasso store. On April 2, Union Local 644 filed a petition in Case 16-RC-8319 in which it sought to represent the meat department employees of Respondent's Owasso store. Thereafter, on May 8, the Regional Director for Region 16 of the Board issued a Decision and Direction of Election in which decision the Regional Director determined that the following units constituted units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. In Case 16-RC-8313:

All regular full-time and part-time employees working for the Employer in the store located at 11520 N. Garnett Rd., Owasso, Oklahoma; excluding meat market employees, manager, guards, watchmen and supervisors as defined in the Act, as amended.

In Case 16-RC-8319:

All regular full-time and part-time meat market employees working for the Employer in the store located at 11520 N. Garnett Rd., Owasso, Oklahoma; excluding all other grocery and produce department employees, manager, supervisors, guards and watchmen as defined in the Act, as amended.

The Regional Director directed that an election be held in both units and scheduled the elections for June 4. Following the issuance of the Regional Director's Decision and Direction of Election, Respondent timely filed with the Board a request for review of the Regional Director's decision. On June 3, the Board denied the request, stating that it raised no substantial issues warranting review.

The tally of ballots in Case 16-RC-8313 dated June 4 reflects that Union Local 73R received 22 votes, with 13 votes cast against the labor organization and 2 nondeterminative challenged ballots. The tally of ballots in Case 16-RC-8319 dated June 4 reflects that Union Local 644 received five votes, with one vote cast against the labor organization, and there were no challenged ballots. On June 10, Respondent filed timely objections to conduct affecting the results of the elections. Thereafter, the Regional Director conducted an investigation and, as a result thereof, in a supplemental decision dated July 7 overruled Respondent's objections. Respondent filed with the Board a request for review of the Regional Director's supplemental decision, which request was denied by the Board on August 17. The Board in its denial of Respondent's request for review stated, "Employer's request for review of Regional Director's Supplemental Decision is hereby denied as it raises no substantial issues warranting review." A Certification of Representative issued in both cases on August 17, certifying Union Local 73R and Union Local 644 as the exclusive representatives of all employees in the respective units set forth *supra*.

On August 25, Charles M. Nobles, president of Union Local 73R, sent a letter to Respondent's store manager,

Jim Hoffman, in which letter Nobles stated he was in receipt of the Certification of Representative from the Board in Case 16-RC-8313, requested certain bargaining information, informed Respondent of the identity of Union Local 73R's negotiating committee, indicated Union Local 73R would prepare and forward contract proposals to Respondent, and requested that all negotiating sessions be conducted in Tulsa, Oklahoma. Respondent's vice president, Harrison Huls, responded in writing to Nobles' letter on August 27, acknowledging receipt of Nobles' letter and stating in part:

To the extent that the said letter constitutes a demand to bargain, said demand is rejected. . . . We assume that the rejections contained above came as no surprise to you.

We have indicated in our filings with the National Labor Relations Board and its Regional Office, in our hearings before the local office and in all of our communications to all of our employees that we intend to protect their rights to the fullest extent possible. Those rights include a judicial determination as to whether the multitude of rulings made by the National Labor Relations Board were, in fact, correct or were, as we believe, erroneous, inconsistent with the facts as presented and contrary to the National Labor Relations Act, as amended, and the judicial decisions based thereon. We believe those rulings have been incorrect in a number of particulars including, but not limited to, the Board's refusal to allow all six of our stores to participate in determination of whether their bargaining rights will be handed over to an international labor organization. In addition, we believe that the improper, inappropriate and artificial division of our store located at Owasso into two wholly separate and independent units for bargaining purposes is clearly contrary to established law. Finally, we believe that the election was not conducted in accordance with the law and did not comply with the requirements established by several courts.

Therefore, we have no choice but to reject each and all of your requests contained in the above-referenced letter of August 25, 1981. Our employees are entitled to a judicial review of the decisions of the Board and we intend to preserve that right.

On August 26, Union Local 644 President John S. Stone sent a letter to Store Manager Hoffman stating he was in receipt of the Certification of Representative in Case 16-RC-8319, requesting certain information, indicating his availability for contract negotiations at any time, and requesting that Respondent advise him of a time and place for negotiations. On August 31, Respondent's vice president, Huls, responded to Stone's letter stating in part:

The aforementioned letter is apparently a request to engage in collective bargaining in the unit described in the Certification of Representative issued by the National Labor Relations Board in Case No. 16-

RC-8319. Insofar as this letter may constitute a demand to bargain, our concerns for the legal rights of our employees dictate that we must reject said demand.

Vice President Huls, in his letter to Stone, gave essentially the same reasons to Union Local 644 for refusing to bargain as he had given to Union Local 73R in his letter to Nobles.

As set forth *supra*, the consolidated complaint in the instant cases issued on September 24. With respect to the unfair labor practices, the consolidated complaint alleges in substance that on August 17, following the Board-conducted election described above in Cases 16-RC-8313 and 16-RC-8319, Union Local 73R and Union Local 644, respectively, were duly certified as exclusive collective-bargaining representatives of Respondent's employees in the units found appropriate, and that commencing on or about August 27, with respect to Union Local 73R, and August 31, with respect to Union Local 644, Respondent has refused, and continues to date to refuse, to bargain collectively with Union Local 73R and Union Local 644 as the exclusive bargaining representatives in violation of Section 8(a)(5) and (1) of the Act.

B. Contentions of the Parties

Counsel for the General Counsel in oral argument at the hearing contended that the instant cases constituted classic 8(a)(5) and (1) violations in that Respondent was attempting to do nothing more than test the certifications issued by the Board. Counsel for the General Counsel contended that all elements of a violation were established in both cases in that petitions were filed, a hearing was held, a decision was issued, objections were filed, a supplemental decision issued, certifications issued, a demand for bargaining was made in each case, and a refusal was made by Respondent in each case.

Respondent, on the other hand, contends it is not in violation of Section 8(a)(5) and (1) of the Act because the certifications upon which said violations are based are improper and contrary to the law and precedent of the Board and Federal courts. Respondent specifically contends with respect to Union Local 644 that the meat market employees of Respondent at its Owasso store do not constitute an appropriate unit for collective bargaining. Respondent further contends that a single-store bargaining unit is inappropriate given the organizational structure and management of its six-store chain. Additionally, Respondent contends that the elections held in both cases (Cases 16-RC-8313 and 16-RC-8319) were invalid due to unlawful electioneering by union supporters in and around the polling area shortly before and after the voting began on June 4.⁴

⁴ Respondent requested to call as witnesses corporate official Ron Van Winkle and Store Manager James Hoffman. Respondent's counsel represented at the hearing that Van Winkle would testify as to the appropriateness of the bargaining unit in both cases, Cases 16-RC-8313 and 16-RC-8319, both as to whether the unit should have been a six-store chain or a one-store unit and whether the meat market employees in the Owasso store should have voted separately from the grocery store unit. Respondent's counsel represented that Hoffman would testify that, just prior to the polls opening on the day of the election, a group of employees suddenly put on campaign buttons for the first time during the cam-

C. Discussion and Analysis

It is well settled that, in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) of the Act is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Sections 102.67(f) and 102.69(c). Respondent in the instant cases filed timely exceptions to the Regional Director's Decision and Direction of Election dated May 8, and to the Regional Director's supplemental decision dated July 7, and both requests for review were denied by the Board. The denial of the requests for review by the Board constituted an affirmation of the Regional Director's actions and precludes relitigating any such issues in any related subsequent unfair labor practice proceeding.

All issues raised by the Respondent in the instant consolidated cases were or could have been litigated in the prior representation proceedings. Respondent did not offer to adduce at the hearing herein any newly discovered or previously unavailable evidence, nor did it in my opinion allege any special circumstance which would require a reexamination of the decisions made in the representation proceedings. I therefore conclude and find that Respondent has not raised any issue which is properly litigable in the instant unfair labor practice proceeding.

I find that the two units set forth above constitute units appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act. I further find that on June 4 a majority of the employees of Respondent in the unit described above in Case 16-RC-8313, by a secret-ballot election conducted under the supervision of the Regional Director for Region 16 of the Board, designated and selected Union Local 73R as their representative for the purposes of collective bargaining with Respondent, and that on August 17 a Certification of Representative issued certifying Union Local 73R as the exclusive collective-bargaining representative of the employees in the previously described unit. I further conclude and find that on June 4 a majority of the employees of Respondent in the unit described above in Case 16-RC-8319, following an election by secret ballot conducted under the supervision of the Regional Director for Region 16 of the Board, designated and selected Union Local 644 as their representative for the purposes of collective bargaining with Respondent, and that on August 17 a Certification of Representative issued certifying Union Local 644 as the exclusive bargaining representative of the employees in the above-described unit. At all times since August 17, Union Local 73R and Union Local 644 have continued to be the exclusive representatives in the respective units of Respondent's em-

paign and congregated in a large group in and around the polling place. Inasmuch as Respondent's counsel indicated those were the only matters to be testified to by Van Winkle and Hoffman, I denied Respondent's request to call the two witnesses in question and to develop the lines of testimony Respondent sought inasmuch as the appropriateness of the units and the conduct affecting the results of the election were not before me.

employees within the meaning of Section 9(a) of the Act. I further find that, following written demands by both Union Local 73R and Union Local 644, Respondent, since on or about August 27, with respect to Union Local 73R, and August 31, with respect to Union Local 644, has refused, and continues to refuse, to recognize and bargain with Union Local 73R and Union Local 644 as the exclusive representatives for collective bargaining of all employees in the above-described units. Accordingly, I find that Respondent has, since on or about August 27, with respect to Union Local 73R, and August 31, with respect to Union Local 644, and at all times thereafter, refused to bargain collectively with Union Local 73R and Union Local 644 as the exclusive representatives of the employees in the appropriate units and that, by such refusals, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Foodland, Inc., d/b/a Super-H Discount, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and, upon request, bargain collectively with Union Local 73R and Union Local 644 as the exclusive representatives of all employees in the appropriate units and, if an understanding is reached, embody such understanding in signed agreements.

In order to ensure that the employees in the appropriate units will be accorded the services of their selected bargaining agents for the period provided by law, I shall recommend that the initial period of certification be construed to begin on the date Respondent commences to bargain in good faith with Union Local 73R and Union Local 644 as the recognized bargaining representatives in the appropriate units. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

CONCLUSIONS OF LAW

1. Foodland, Inc., d/b/a Super-H Discount, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers, Retail Clerks Union Local 73R, is a labor organization within the meaning of Section 2(5) of the Act.

3. United Food and Commercial Workers International Union, Meat Cutters Local No. 664, AFL-CIO-CLC, is

a labor organization within the meaning of Section 2(5) of the Act.

4. All regular full-time and part-time employees working for Respondent in the store located at 11520 North Garnett Road, Owasso, Oklahoma, excluding meat market employees, managers, guards, and watchmen and supervisors as defined in the Act, as amended, constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. All regular full-time and part-time meat market employees working for Respondent in the store located at 11520 North Garnett Road, Owasso, Oklahoma, excluding all other grocery and produce department employees, managers, supervisors, guards and watchmen as defined in the Act, as amended, constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. Since August 17, the labor organization named in paragraph 2 above has been, and now is, the certified and exclusive representative of all employees in the appropriate unit set forth in paragraph 4 above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

7. Since August 17, the labor organization named in paragraph 3 above has been, and now is, the certified and exclusive representative of all employees in the appropriated unit set forth in paragraph 5 above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

8. By refusing on or about August 27, and at all times thereafter, to bargain collectively with the labor organization named in paragraph 2 above as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit described in paragraph 4 above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

9. By refusing on or about August 31, and at all times thereafter, to bargain collectively with the labor organization named in paragraph 3 above as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit described in paragraph 5 above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

10. By the aforesaid refusals to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

11. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁵

The Respondent, Foodland, Inc., d/b/a Super-H Discount, Owasso, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with United Food and Commercial Workers, Retail Clerks Union Local 73R, as the exclusive bargaining representative of its employees in the following appropriate unit:

All regular full-time and part-time employees working for Respondent in the store located at 11520 North Garnett Road, Owasso, Oklahoma, excluding meat market employees, managers, guards, and watchmen and supervisors as defined in the Act, as amended.

(b) Refusing to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with United Food and Commercial Workers International Union, Meat Cutters Local No. 644, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

All regular full-time and part-time meat market employees working for Respondent in the store located at 11520 North Garnett Road, Owasso, Oklahoma, excluding all other grocery and produce department employees, managers, supervisors, guards and watchmen as defined in the Act, as amended.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with United Food and Commercial Workers, Retail Clerks Union Local 73R, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, bargain with United Food and Commercial Workers International Union, Meat Cutters Local No. 644, AFL-CIO-CLC, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its Owasso, Oklahoma, facility copies of the attached notice marked "Appendix."⁶ Copies of said

⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food and Commercial Workers, Retail Clerks Union Local 73R, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food and Commercial Workers International Union, Meat Cutters Local No. 644, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with United Food and Commercial Workers, Retail Clerks Union Local 73R, as the exclusive representative of all employees in the bargaining unit described immediately below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All regular full-time and part-time employees working for us in the store located at 11520 North Garnett Road, Owasso, Oklahoma, excluding meat market employees, managers, guards,

and watchmen and supervisors as defined in the Act, as amended.

WE WILL, upon request, bargain with United Food and Commercial Workers International Union, Meat Cutters Local No. 644, AFL-CIO-CLC, as the exclusive representative of all employees in the bargaining unit described immediately below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such under-

standing in a signed agreement. The bargaining unit is:

All regular full-time and part-time meat market employees working for us in the store located at 11520 North Garnett Road, Owasso, Oklahoma, excluding all other grocery and produce department employees, managers, supervisors, guards and watchmen as defined in the Act, as amended.

FOODLAND, INC., D/B/A SUPER-H DIS-COUNT